United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR PETITIONERS

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

087

No. [illegible],305

THE BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

On Petition to Review and Set Aside an Order of the Federal Maritime Commission

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United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 14 1969

[illegible]

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STATEMENT OF QUESTIONS PRESENTED

Upon findings of fact and on the record did the Commision err in concluding that charges for storage of consignee's cargo during a strike of longshoremen who were not employees of the ocean carrier were not assessable to the ocean carrier?

Upon the facts found, did the Commission mis-apply applicable law?

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No. 21,305

Petitioners

The Boston Shipping Association, Inc.
American Export Lines, Inc.
American President Lines, Ltd.
Boston Shipping Corporation
Furness, Withy & Co., Ltd.
Moore-McCormack Lines, Inc.
J. F. Moran Co.
Moran Shipping Agencies, Inc.
Norton, Lilly & Company, Inc.
C. Campbell Patterson, Jr. and John I. Wylde
d/b/a Patterson, Wylde & Company
Peabody & Lane, Inc.
C. H. Sprague & Son Co.
United States Lines Company

v.

Respondents

Federal Maritime Commission and
United States of America

Intervening Respondents

Port of Boston Marine Terminal Association
Massachusetts Port Authority
The Mystic Terminal Company
Port Terminals, Inc.
Wiggin Terminals, Inc.
The New York Central Railroad Company

On Petition to Review and Set Aside an Order of the Federal Maritime Commission

BRIEF FOR PETITIONERS

STATEMENT OF JURISDICTION

The origin of the case was a civil action in the Suffolk Superior Court of Massachusetts for payment of tariff charges. The action was removed to the United States District Court for the District of Massachusetts and designated as Civil Action No. 65-640-W. Federal Judge Wyzanski thereafter stayed the action until the reasonableness of the tariff was submitted to the Federal Maritime Commission. On June 28, 1967 the Commission entered an order on Case No. 66-28 by which the petitioners were aggrieved and on July 27, 1967 the United States District Court amended its order permitting defendant-petitioners to pursue right of appeal. Petitioners are corporations having a usual place of business in Massachusetts. Respondent is an Executive Agency with its principal office in the District of Columbia. Permissive parties also before the Court as intervening respondents are Port of Boston Marine Terminal Association, Massachusetts Port Authority, The Mystic Terminal Company, Port Terminals, Inc., Wiggin Terminals, Inc. and The New York Central Railroad Company. This Court has jurisdiction over this action and the parties hereto under the provisions of the Judicial Review Act of 1950, 5 USCA 1031-1042. Venue is in this Court pursuant to said Act, 5 USCA 1033.

STATEMENT OF THE CASE

Ocean freight rates on general cargo to Boston provide for movement from a place of rest at the port of origin to a place of rest at the port of destination, Boston. The movement required by the vessel's obligation terminates upon discharge of the cargo from the vessel and its deposit at its place of rest on the pier. An independent

stevedoring company, which in turn hires longshoremen and clerks from union locals affiliated with the I.L.A., performs the discharging and depositing on the pier. Notice of arrival is given to the consignee giving the date and pier where the cargo will arrive. The notice is received on or before the day the vessel arrives at Boston. The vessel upon completion of discharge usually departs the port of Boston. Free time is provided by the terminal operator (pier operator) and commences to run on the completion of discharge and departure of the vessel. Throughout the history of the port prior to the disputed tariff charge at Boston, storage charges, after the five-day free time period, were regularly assessed against the cargo. A reduced rate for wharf demurrage or storage was applied if cargo removal was prevented by factors beyond the control of the consignees. Thus Tariff No. 1 issued on July 1, 1962 pursuant to approved Agreement no. 8785 so provided. In 1964, however, the tariff was revised and storage charges for cargo remaining on the pier during a period of a strike was purportedly made assessable against the vessel, although the vessel had departed from the pier and no employment relationship existed between the vessel and the striking longshoremen.

At Boston, no steamship company owns any pier, but piers are operated only by so-called terminal operators. The tariff of the terminal operators gives to the cargo owner five days of "free time" to come for his goods. If the cargo owner does not pick up his goods from the terminal in five days, the cargo owner is charged for storage by the terminal operator under the tariff of the terminal operator. The present issue is concerned with charges for storage of the cargo owner's goods on the terminal operator's pier during a strike of longshoremen employed by stevedoring contractors. Although, the carrier was not the owner of the goods, nor the employer of the striking

longshoremen, the disputed tariff purported to charge the carrier for storage of the goods on the terminal operator's pier during the longshoremen's strike.

The longshoremen's strike commenced on September 30, 1964 but was stayed by court injunction on October 1, 1964. It commenced again on January 11, 1965 and lasted 33 days. Most of the cargo affected was still in the free time period at the commencement of the strike and was not picked up by the consignees until the strike had ended.

Strike storage was assessed against the petitioners and upon refusal to pay, action was brought by the Port of Boston Terminals. The United States District Court, District of Massachusetts, stayed its proceedings in order that the reasonableness of the tariff be determined by the Federal Maritime Commission.

Hearing Examiner found that assessment of strike storage charges to the vessel was unreasonable. (p. 63, J.A.) On appeal, the members of the Commission modified the Hearing Examiner's findings by directing that strike storage charges would be assessable against the consignee for all cargo which had been on the pier more than the five days free time period when the strike started. (p. 81, J.A.) With respect to the cargo which was in free time, i.e. on the pier for five days or less, when the strike started, the Commission ruled that strike storage was assessable against the vessel upon the apparent ground that as the free time period had not expired a tender of delivery had not been made by the carrier even though the carrier had departed the port of Boston. (p. 81, J.A.)

STATEMENT OF POINTS

1. The Commission erred in refusing to rule that the carrier's obligation was to tender for delivery only.

2. The Commission erred in extending the carrier's common law obligation to tender for delivery into the function of actual delivery.

SUMMARY OF ARGUMENT

1. The obligation of the carrier is to "tender for delivery".
2. A "tender for delivery" is made when the cargo is deposited at a reasonable pier and notice given to the consignee.
3. The reasoning that "tender for delivery" is not made until the completion of the free time period is in error since it renders meaningless the legal differences between tender for delivery and actual delivery.

ARGUMENT

The commission then made a purported analysis of the common law which contained errors of law. Thus the commission apparently misconstrued the distinction between the carrier's obligation to tender for delivery and not to make actual delivery. The distinction is found in the case of *American President Lines, Ltd.* v. *Federal Maritime Board,* 317 F.2d 887 (D.C. 1962) which was cited by the commission in its opinion but which is cited in the present instance by the petitioners. The language in the case which bears upon the present issue appears at Page 888 and reads as follows:

> "Ships bringing transoceanic freight into port are required by their transportation obligation, absent a special contract, to unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the con-

signee, and afford the consignee a reasonable opportunity to come and get it."

The key phrase is the words "reasonable opportunity". If the unreasonableness of that opportunity is measured at the time the carrier performs his act of placing it on the pier then the carrier has completed its obligation to the cargo and thereafter there remains no undischarged obligation. Only if the reasonableness of the carrier's action were measured by hindsight would the carrier's action in leaving it at a usable, proper and commercial pier make the carrier's action later into an unreasonable one upon the occurrence of a strike after the goods had been discharged on the pier. The statements of these alternatives alone demonstrate the impracticality and the injustice of the second alternative; yet that is the one which the commission's opinion purported to adopt.

The commission sought to rest its conclusions upon the collateral matter of free time. First, free time is a part of the contract between the owner of the goods and the owner of the terminal, since the owner of the terminal agrees with the owner of the goods not to charge the owner of the goods for storage until 5 days elapsed *after departure of the vessel.* If the owner of the goods has not taken up his goods by that time the owner of the terminal charges him storage. The ocean carrier is in privity to this contract.

As a second distinction, the conditions which affect reasonableness of the 5 day free time were the earlier and regular pier operations at Boston from which it was normally concluded by the terminal operators that, under normal circumstances, 5 days would not be unreasonable to the pier operator or unreasonable to the owner of the goods for completion of the act of removal from the pier. At a time of imminent longshore strike, 5 days would

seemingly be an inordinate and even protracted period to extend to the owner of the goods since such circumstances plainly called for special attention in expediting the removal from the pier.*

The tariff is, therefore, unreasonable not only in its retrospective recharacterization of the carrier's act of depositing the goods on the pier from reasonable to unreasonable, depending upon the later occurrence of a longshoremen's strike after the vessel had departed, but also because it fails to place the responsibility for avoidance of the strike storage charges upon the consignee/owner of the goods who is best able to prevent those charges from occurring by making special and early provisions for removal.

The decision of the maritime commission did not enter the area of evaluating these respective considerations but rested its conclusion upon an erroneous conception of the carrier's legal obligation. The carrier's action in tendering for delivery must be measured in terms of its reasonableness at the time it is performed. To be sure, if the carrier selects a pier at which it knows the consignee will not be able to have access then the carrier's action is unreasonable *ab initio*. An illustration of this is the case of *Standard Brands, Inc.* v. *Nippon Yusen Kaisha,* 42 F. Supp. 43 (D. Mass. 1941) where the carrier left goods on a pier near a defective door so that rain water came in and soaked it, but in that instance the unreasonable quality of the carrier's action is present at the time of placing it on the pier occurs.

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* The record contains special attempts by steamship personnel urging the consignee to especially call for their goods as quickly as possible, but the consignee whose goods are herein concerned were completely unresponsive. The possibility that the consignee had no immediate need of the goods for the duration of the strike and were seeking a free storage period on the piers during the strike suggests itself. (p. 108, J.A.)

The longshore strike was a coast-wide strike and there was no reasonable purpose in delivering cargo at a different port than Boston. The piers selected were well established; well operated regular terminals at the port of Boston all of which were owned by the Massachusetts Port Authority and all of which were operated by regular, professional terminal operators. None of the steamship companies operated any of the terminals. The port of Boston maintained competent, professional independent stevedoring contractors who discharged the cargo onto the surface of the piers. The failure to avoid the later occurrence of the strike was a failure of the consignee and terminal operator who were all fully aware of the imminence of the strike to take up their goods from the pier with sufficient promptness to have avoided it. Certainly the "business as usual" standard of 5 full days of free time was a most unreasonable standard for a responsive performance by the owner of the goods as given by the owner of the terminal. To place upon the departed vessel the severe consequences of the unreasonable action by the consignee in failing to act and of the terminal operator in failing to provide in his tariff a requirement for such action in direct conflict with the common law principle which defines the carrier's obligation as one of tender for delivery only. The reasonableness of the conduct of a carrier who places its goods at a well established pier and who, as the records show, took special pains to urge the consignee to act with dispatch appropriate to the well publicized deadline ought not to be distorted into a penalty. The decision of the commission does not even enter an evaluation of these issues but stops at the erroneous threshold of law.

The commission places emphasis upon the expiration of the free time period as a prerequisite to a "tender for delivery". However, in the case of *North American Smelt-*

ing Co. v. *Moller SS Co.,* 204 F.2d 384, the Court noted that the issue of delivery was confused by references to the free time period. Again in the case of *Calcot, Ltd.* v. *Isbrandtsen Company,* 318 F.2d 669, the Court in discussing the free time period in relation to a tender for delivery, stated ". . .rules and customs concerning storage charges have no relevance to the question of what constitutes a proper delivery of the cargo." In both of these cases the Court declared that the cargo was certainly at the consignee's disposal throughout the free time period and that it lay there at the consignee's convenience. It was, therefore, concluded that a "tender for delivery" is made when the cargo is deposited at its place of rest on the pier and notice is given to the consignee.

The case of *David Crystal, Inc.* v. *Cunard Steamship Co.,* 339 F.2d 295 (CCAZ — 1964) further supports this decision as after discharge of the cargo the Court characterized the status of the carrier as a bailee.

Respectfully submitted,

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BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 21,305

THE BOSTON SHIPPING ASSOCIATION, INC., et al.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER OF
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QUESTION PRESENTED

1. Based upon the findings of fact of the Commission and on the record, did the Commission err in concluding that storage charges for cargo were assessable to the vessel; upon the facts found, did the Commission misapply applicable law?

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COUNTERSTATEMENT OF THE CASE

Petitioner seeks review of a final order of the Federal Maritime Commission (Commission) issued and served on June 28, 1967, pursuant to the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. §801 et seq. (Act). The order was issued in the Commission's Docket No. 66-28, The Boston Shipping Association v. Port of Boston Marine Terminal Association. Jurisdiction to review the Commission's order is conferred by 28 U.S.C. §2341 et seq.

Petitioner, Boston Shipping Association (BSA), whose function is to represent and protect the interests of its members in Boston waterfront activities (J.A. 29, 66), is a non-profit corporation comprised of ocean steamship companies (their ships have exclusive use of assigned berths in the port of Boston), agents for the steamship companies and stevedoring companies.[1/]

Import and export cargo at Boston is handled at piers managed and controlled by terminal operators represented by the Port of Boston Marine Terminal Association (PBMTA).[2/] Terminal operators are subject to the Shipping Act[3/] and therefore were required by section 15 of the Act, 46 U.S.C. §814,

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1/ The members are: American Export Lines, Inc.; American President Lines, Ltd.; Boston Shipping Corp.; Farrell Lines, Inc.; Furness, Withy & Co., Ltd.; Moore-McCormack Lines, Inc.; J.F. Moran Co.; C. Campbell Patterson, Jr. & John I. Wylde, d/b/a Patterson, Wylde & Company; Peabody & Lane, Inc.; C.H. Sprague & Son Co.; United States Lines Company.

2/ The members are: Massachusetts Port Authority; The Mystic Terminal Company; Port Terminals, Inc. (replacing Terminal Operator, Inc.); Wiggin Terminal, Inc.; and New York Central System (Boston & Albany Division).

3/ Shipping Act, 1916, §1, 46 U.S.C. §801; California v. United States, 320 U.S. 577, 585-86 (1944).

to file their agreements for approval by the Commission.[4] PBMTA's agreement, No. 8785, covers all services, facilities, rates and charges incidental to wharfage,[5] dockage,[6] free time,[7] and wharf demurrage.[8] Free time and wharf demurrage are involved in this proceeding.

The only issue raised here concerns the Commission's finding as to who should pay wharf demurrage when the consignee cannot pick up his cargo because of a strike which began during free time. Under normal circumstances wharf demurrage is assessed against the cargo - i.e., against the shipper of export goods or the consignee of import goods as a penalty for leaving his goods on the pier outside his allowed free time. It also serves to compensate the operator of the pier for protecting and storing the cargo until finally picked up.[9]

4/ Section 15 immunizes these anticompetitive agreements conditioned upon effective Commission regulation. See <u>Federal Maritime Board</u> v. <u>Isbrandtsen Co.</u>, 356 U.S. 481 (1958).

5/ "Wharfage" is a charge for the use of the pier by shippers and consignees and is assessed against all <u>cargo</u> going across the pier.

6/ "Dockage" is a charge assessed against the vessel for space alongside the pier.

7/ "Free time" is a period of time during which cargo is permitted to remain on the pier free of penalty charges, immediately prior to being loaded on the vessel or immediately after discharged from the vessel. However, it does not "free" cargo of its normal charges for services provided by the terminal operator such as wharfage. In Boston, the free time period is five days.for import cargo and seven days for export cargo. (J.A. 34)

8/ "Wharf demurrage" is a charge usually assessed against <u>cargo</u> which remains on the pier after the expiration of free time.

9/ <u>Free Time and Demurrage Charges at New York</u>, 3 U.S.M.C. 89, 107 (1948).

Agreement No. 8785 was approved May 7, 1962 and PBMTA's original tariff (J.A. 17), effective July 1, 1962, set wharf demurrage at two and one half cents per 100 pounds per day. However, the tariff also provided that when cargo was "prevented from removal by factors beyond consignee's control such as strikes . . . " the wharf demurrage would only be one cent per 100 pounds per day. (J.A. 18).

In August 1964, the Massachusetts Port Authority, a PBMTA member, which operates piers in Boston, wrote to PBMTA noting that cargo owners' dissatisfaction with having to pay wharf demurrage when the pick up of their cargo is delayed by strike.[10/] In December 1964 PBMTA filed a revised tariff, effective January 21, 1965, specifically providing that "strike storrage [PBMTA's designation for wharf demurrage caused by a strike] assessed on cargo prevented from removal from the Terminal will be assessed to the <u>vessel</u>" unless the strike is of terminal employees. (Emphasis supplied). Moreover, the assessment for cargo not picked up because of a strike was cut in half to one half cent per 100 pounds per day. (J.A. 16). No issue has been raised as to the reasonableness of the strike storage rate, nor does petitioner contend that the terminals are not entitled to compensation for the services they perform during the strike.

10/ "Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times, it seems almost useless to advise them that a reduction in charges is established in the tariff for that purpose." (J.A. 130).

A longshoremen's strike began on January 11, 1965 and lasted 33 days.[11/] The terminals' guards and watchmen stayed on duty, but the consignees' truckmen and railroadmen refused to enter the terminals and pick up cargo.

PBMTA assessed strike storage against the vessels pursuant to the revised tariff. When the vessels refused to pay, PBMTA commenced suit to recover the amounts due in a Massachusetts state court. The action was removed to the United States District Court for Massachusetts and that court stayed its proceeding on the ground that the Commission had primary jurisdiction to determine who was liable for strike storage. (J.A. 72).

BSA thereupon filed a complaint with the Commission on April 21, 1966 alleging violations by PBMTA of sections 15, 16 and 17 of the Shipping Act, 46 U.S.C. §§814, 815 and 816. The examiner found no violation of section 15, but found that the strike storage charge violated section 16 because the storage was for the benefit of the cargo and the charge against the vessel was therefore unduly preferential and prejudicial as between users of the terminal facilities. The examiner also found that the charge was an unfair and unjust practice within the meaning of section 17.

11/ Boston waterfront labor contracts are tied to a master contract negotiated by their union, the International Longshoremen's Association, and the New York Shipping Association. The ILA contract expired on September 30, 1964 and an 80 day Taft-Hartley injunction was obtained against a strike. NYSA and ILA reached agreement on December 16, 1964, four days before expiration of the 80-day cooling off period. Because of the confidence of the union representatives that the contract would be ratified, the longshoremen adopted the unusual course of staying on their jobs pending ratification. Contrary to general expectations, however, the ILA membership rejected the contract, a situation unique in the maritime industry. The ILA thereupon struck the East Coast ports. See, Imposition of Surcharge at United States Atlantic and Gulf Ports, 7 Pike and Fisher SRR 405, 409 (June 30, 1966).

On June 28, 1967 the Commission issued its report and order (J.A. 64, 86) and agreed that the strike storage charge did not violate section 15, but concluded, contrary to the examiner, that section 16 had not been violated (J.A. 85).

The Commission agreed with the examiner that the strike storage charge was unjust and unreasonable under section 17 as to cargo still on the pier after the expiration of free time (i.e., already in wharf demurrage) since "(o)nce free time has expired, the vessel's transportation obligation has ended" and "it is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear the risk of any additional charges resulting from a strike occurring after free time has expired." (J.A. 81).

However, the Commission disagreed with the examiner on the issue of who should pay strike storage when the strike begins <u>during</u> free time. The Commission found that the vessel should be liable for strike storage in that event, since its transportation service was not at an end until the expiration of free time. The Commission concluded that it "would place the burden upon him who at the time of the strike owes a undischarged obligation to the cargo." (J.A. 80). As to that cargo, the Commission found PBMTA's tariff not unreasonable.

BSA filed this petition to review the Commission's order on September 19, 1967[12/] or 83 days after the Commission issued the Report and Order which petitioner seeks to review.

12/ By order of this court filed October 29, 1967 the following persons were allowed to intervene: Port of Boston Marine Terminal Association; Massachusetts Port Authority; The Mystic Terminal Company; New York Central Railroad Company; Port Terminals, Inc.; and the Wiggin Terminals, Inc. (J.A. 97).

SUMMARY OF ARGUMENT

The statute providing for judicial review of Federal Maritime Commission orders provides that a petition to review must be filed within 60 days of entry of a final order. Since petitioner filed its petition 23 days out of time, the petition to review should be dismissed for lack of jurisdiction.

In any event, the Commission was correct in finding PBMTA's tariff not unreasonable as to strike storage assessed for cargo in free time at the time a strike begins. The carrier's total transportation service for which he is paid requires that he assure the consignee a reasonable period of time to come to the pier and get his cargo, and the determination of when a carrier's obligation to the cargo ends is for the Commission, not the courts. The Commission therefore was correct in holding that the carrier's obligation to the cargo extends until the cargo is claimed or until the expiration of free time.

Since terminal services performed during free time are primarily for the one still owing an obligation to the cargo, i.e. the carrier, the Commission did not err in finding reasonable PBMTA's tariff assessing strike storage against the carrier for cargo still in free time when the strike begins. The Commission was only required to approve a reasonable assessment of strike storage, not supply the best possible solution to the problem.

ARGUMENT

I. THE PETITION TO REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

28 U.S.C. §2341 et seq. provides for the review of orders of the Federal Maritime Commission and states:

> "On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. . . ." 28 U.S.C. §2344

The Commission's final report and order were issued June 28, 1967. (J.A. 64,86). However, BSA didn't file its petition to review the order until September 19, 1967, or 83 days after entry of the order. The petition to review is out of time and therefore should be dismissed for lack of jurisdiction. Lasky v. Commission of Internal Revenue, 235 F.2d 97, 99 (9th Cir. 1956); Jilka v. Mickley, 348 F.2d 154, 155 (10th Cir. 1965).

Petitioner presents no satisfactory reasons for excusing it from the 60-day filing requirements. The order was clearly directed at BSA and was effective immediately. Petitioner made no attempt to have the Commission modify its order either by reopening its docket or reconsidering its decision. Cf. Functional Music v. F.C.C., 107 U.S.App.D.C. 34, 274 F.2d 543 (1958), cert. denied, 361 U.S. 813 (1959). Moreover it is the review statute, not the order of the United States District Court

staying its action until the Commission first exerted its primary jurisdiction which governs petitioner's right to review.[13/]

II. IN ANY EVENT, THE COMMISSION WAS CORRECT IN FINDING THAT THE ASSESSMENT AGAINST THE VESSEL OF STRIKE STORAGE IS NOT UNREASONABLE WHEN THE STRIKE BEGINS DURING FREE TIME.

Section 17 of the Shipping Act, 46 U.S.C. §816, charges the Commission with insuring "just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property." The only question raised in this review is whether the Commission erred in not declaring unreasonable or unjust that portion of PBMTA's tariff provision which provided that the vessel (i.e. the carrier) rather than the cargo (i.e. the shipper or consignee) must pay strike storage when a strike, beginning during free time, prevents the consignee from picking up his cargo.

The Commission drew a line for the payment of strike storage which logically conforms with the vessel's obligation to its cargo. The carrier's obligation includes transportation, off-loading, stowage at some safe place on the pier accessible to the consignee, and the assurance that the consignee has a reasonable opportunity to come and get his cargo. American President Lines v. Federal Maritime Board, 115 U.S.App.D.C. 187,

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13/ In any event, petitioner has not sought to put Judge Wyzanski's order before this court. Because the order was not introduced into the Commission proceeding, it has not been certified to the court as part of the record.

317 F.2d 887, 888 (1961). Unless the consignee has sufficient time to pick up his cargo, the carrier has not fulfilled his obligation to "tender for delivery." Id. at 889.

Because of the prevalent congestion on the piers and other delays in picking up cargo, free time is necessary to permit the carrier to fulfill his obligation of tendering the goods for delivery by providing the consignee with adequate time to pick up his cargo. See Truck and Lighter Loading and Unloading Practices at New York Harbor, 9 F.M.C. 505 (1966); Pennsylvania Motor Truck Ass'n v. Philadelphia Piers, 3 F.M.B. 789 (1952); McDowell and Gibbs, Ocean Transportation, 167-68 (1954). It "is not a gratuity to consignee but is allowed solely to permit the carriers to fulfill their obligation to deliver goods." Free Time and Demurrage Charges at New York, 3 U.S.M.C. 89, 103 (1948). Investigation of Free Time Practices - Port of San Diego, 9 F.M.C. 525, 539 (1966). Indeed, the length of the free time period is usually a measure of what the Commission considers the minimum amount of time required for completion of the vessel's transportation service. See Id. at 104, aff'd sub nom., American President Lines v. Federal Maritime Board, supra at 889; Pennsylvania Motor Truck Association v. Philadelphia Piers, supra at 796; Investigation of Free Time Practices - Port of San Diego, supra at 539. Free time in Boston is five days and petitioner has not challenged its reasonableness. The Commission therefore was justified in holding that the vessel's obligation to the cargo continues until the expiration of free time.

Moreover, "the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the

Commission not the courts." United States v. Wabash R.R. Co., 321 U.S. 403, 408 (1944), Baltimore & Ohio R.R. Co. v. United States, 305 U.S. 507, 525-26 (1939). The Commission found that "(o)nce the cargo has remained on the pier for these five days, the transportation obligation of the carrier is ended and the services performed by the terminal for the carrier are also at an end." (J.A. 77).

The task of deciding such questions has been entrusted to the Commission as the "administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade" United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 485 (1932); Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 303-04 (1937) and the courts should not substitute their view of when the carrier's transportation obligation ends for that of the Commission. Id. at 304.

Boston terminal operators were entitled to "fair compensation for sheltering and protecting a consignee's property during the period of involuntary bailment after expiration of free time." Free Time and Demurrage Charges at New York, supra at 107-08 (1948).[14/] (There is no suggestion that strike storage, which was cut to only one-fifth of the normal wharf demurrage rate, serves as a penalty.) But, the cost of PBMTA's services should come from the one receiving the benefit. California v. United States, 320 U.S. 577, 581-82 (1944). Although the terminal's

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14/ Free Time and Demurrage Charges at New York speaks of fair compensation to the carrier for his services during strikes. However, this is only because the carriers in New York own and operate the terminals themselves, whereas PBMTA members are strictly terminal operators. See J.A. 56.

services during a strike obviously are for the eventual benefit of the consignee (and anyone else who relies on the cargo in his business), the vessel is principally benefitted when the strike occurs during free time since its obligation to the cargo has not ended. In upholding as not unreasonable the tariff assessment against the vessel in such a case, the Commission "would place the burden upon him who at the time of the strike owes a undischarged obligation to the cargo." (J.A. 80).

Petitioner argues that the reasonableness of the opportunity afforded the consignees to pick up the cargo should be measured at the time the cargo is placed at a safe, accessible place on the pier, not at the end of free time, as the Commission did.15/ Petitioner then suggests that because the strike was imminent consignees should have immediately picked up their cargo and not utilized the normal five day free time period. But petitioner does not explain how consignees could have surmounted the usual delays because of pier congestion.16/ Nor does petitioner take into account the amount of free time a particular consignee might have had remaining when the strike began. For example, some cargo might have been off the vessel a few hours when the strike began and it

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15/ Petitioner's argument ignores the findings made by the examiner and the Commission that BSA members consider that they retain some responsibility to the cargo even after free time has expired. (J.A. 37, 70).

16/ The ILA strike began unexpectedly, thus preventing the industry from diverting cargo from the struck ports. Imposition of Surcharge at United States Atlantic and Gulf Ports, 7 Pike & Fisher SRR 405, 415-16 (1966).

would be virtually impossible to pick up in time to avoid strike storage.

PBMTA of course might have devised a different solution in its tariff for allowing strike storage when a strike, begining during free time, prevents removal of the cargo. For example, it might have assessed both cargo and vessel each for half the amount. And had a tariff containing such an assessment been before the Commission, the Commission might also have held that to be not unreasonable. But it does not, of course, follow that the Commission was in error in upholding as not unreasonable the tariff before it, for the Commission is not responsible for providing the best solution to the strike storage problem. Philadelphia Television Broadcasting Co. v. F.C.C., 123 U.S.App. D.C. 298, 359 F.2d 282, 283-84 (1966).

In sum, the Commission's conclusion that PBMTA's strike storage formula was not unjust or unreasonable as applied to cargo in free time when the strike begins should not be disturbed since the finding was supported by evidence and had a rational basis. Consolo v. Federal Maritime Commission, 383 U.S. 607, 620-21 (1966); Swift & Co. v. United States, 343 U.S. 373, 381-82 (1952).

CONCLUSION

For the reasons stated above, the order under review should be affirmed.

Respectfully submitted,

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Federal Maritime Commission

Washington, D. C.
January 2, 1968

BRIEF FOR INTERVENORS.

In the United States Court of Appeals for the District of Columbia Circuit.

No. 21,305.

THE BOSTON SHIPPING ASSOCIATION, INC., ET AL.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION TO REVIEW AN ORDER.

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Question Presented.

The question is whether the Federal Maritime Commission acted arbitrarily, or otherwise not in accordance with law, or without the support of substantial evidence, in declining to rule that the assessment to vessels (rather than to cargo interests) of storage charges accruing during a longshoremen's and clerks' strike was proved to be preferential or unreasonable under the Shipping Act, 1916, where the charges were limited to cargo that was still on free time at the commencement of the strike.

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Table of Authorities Cited.

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*Cases chiefly relied on are marked by asterisks.

STATUTES.

MISCELLANEOUS.

Counterstatement of the Case.

Background of the Problem.

1. The Port of Boston Marine Terminal Association (hereinafter "PBMTA") operates under FMC Agreement No. 8785, an arrangement approved by the respondent Commission. (Report, JA 67.) The terms of Agreement No. 8785 authorize the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, and all terminal facilities and services, and require the filing of pertinent tariffs with the Commission. (Report, JA 67.) PBMTA's members were the Massachusetts Port Authority, the New York Central System, the Mystic Terminal Company, Port Terminals, Inc., and Wiggin Terminals, Inc., all as operators of terminals in the Port of Boston. (Initial Decision, JA 30, note 4.) None of these operators of terminals is a carrier. (Compare petition, JA 90, section IV, first full paragraph.)

2. PBMTA's tariff assessed dockage against the vessel on general cargo at 20¢ per ton. Wharf demurrage was assessed against cargo interests at 2½¢ per 100 pounds per day. (Report, JA 68.) Dockage is defined by the tariff as the charge assessed for the service of providing space alongside the wharf or pier for the docking or berthing of watercraft or the mooring of watercraft, while wharf demurrage is a charge assessed against cargo after the expiration of the period commonly known as free time. (Report, JA 67, notes 2 and 3.) Free time is defined as the period in which cargo is allowed to remain on a pier free of charge prior to loading of a vessel or after discharge from a vessel. (Report, JA 67, note 4.) The tariff provided (and still provides) for a free time of five days on

import cargo and seven days on export cargo. (Report, JA 68.) No issue was presented to the Commission as to the reasonableness of these free-time allowances. (Report, JA 68.)

3. The practice in the Port of Boston is that, on inbound shipments, the vessel sends an arrival notice to the consignee, who usually receives it the morning the vessel docks, but never later than the completion of discharge. (Report, JA 69.) The major portion of the cargo is picked up by the consignee during free time. (Report, JA 69.) The usual procedure is for a truckman or a railroad freight handler on the consignee's behalf to arrive at the pier with an order for the cargo; the cargo is tallied by a tally clerk, an employee of the vessel; while being tallied, the cargo is loaded by the consignee's representatives, one of whom signs the tally proffered by the tally clerk; and lastly a second or delivery clerk enters the data in a "delivery book," at which time the truckman or handler signs against the receipt of the delivery of the cargo. (Report, JA 69; and see JA 139-140.)

4. Ocean freight rates on general cargo into the Port of Boston cover transportation from a place of rest to a place of rest which is generally inside the pier shed to which the cargo is removed upon discharge from the vessel. (Report, JA 68.) It is the vessel's obligation to move the cargo to the place of rest. (Report, JA 68.) This is accomplished by stevedoring companies performing under contract with the vessel and under the direction of the chief clerk, an employee of the vessel. (Report, JA 68-69.) The stevedoring companies perform their service with longshoremen. The latter are members of three longshore locals with whom petitioner Boston Shipping Association negotiates—Locals 799, 800, and 805 of the International Longshoremen's Association. (JA 100, 103.) During

strikes by these longshore locals, trucking employees observe the actual picket line or the effective picket line. (JA 101, characterization by petitioners.) The Boston Shipping Association also negotiates with respect to Local 1066 of the International Longshoremen's Association, of which the members are the clerks. (JA 104.) Tally clerks and other clerks of BSA go on strike at the same time as the longshoremen's locals. (Report, JA 71; JA 104.) Thus, even if a truckman were present on a pier to pick up cargo during a longshoremen's strike, he would not find a steamship clerk. (JA 105.)

5. Under the tariff prevailing under Agreement No. 8785 prior to the change challenged in this proceeding, when cargo was "prevented from removal by factors beyond the consignees' control such as strikes, weather conditions, or similar situations affecting the entire Port area," wharf demurrage was assessed on cargo at a reduced rate of 1¢ per 100 pounds per day (*i.e.*, reduced from 2½¢), but continued to be assessed against the cargo. (Report, JA 68.)

6. PBMTA recognized a problem in assessing wharf demurrage during strikes against the consignees on receiving a letter from one of its members, the Massachusetts Port Authority on August 5, 1964. The author of the letter, Joseph J. Connolly, the pier superintendent of the Port Authority, stated: "Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times it seems almost useless to advise them that a reduction in charges is established for that purpose. I am of the opinion we should establish a more compatible understanding with customers of Boston and assess a charge against the vessel. Consignees, in most instances, are desirous of taking custody of their cargo

as quickly as possible and we all know the turmoil that exists on the piers if a 'strike is imminent'." (Ex. 2, JA 130; and see Report, JA 71.)

7. The members of PBMTA subsequently determined upon a change in the manner and rate of charging wharf demurrage during longshoremen's strikes. The charge is now made against the vessel rather than the cargo, and the rate is reduced to ½¢ per 100 pounds per day. This charge applies when the removal of cargo is prevented by strike of the "vessel's employees, or employees of the agent of the vessel, or firms employed by either the agent or the vessel." (Report, JA 71; and see Initial Decision, JA 33.) No charge is made when removal of cargo is prevented by a strike of the terminal employees. (*Ibid.*) The consignee in any case would be entitled under this tariff to a full five days free time.

8. The change in the manner of charging strike storage was instituted because the members of PBMTA had so many complaints from consignees or users of the Port with reference to wharf storage on merchandise locked on the piers over which the consignees had no control. (JA 116; and see petition, JA 90.) The opinion of the chairman of PBMTA, Sherman L. Whipple, was that consignees would ship through other ports if the terminals did not do something about it. (JA 117.) The problem was not one of bill collection. Mr. Whipple indicated that previous to the change there had been "practically 100%" success in collecting strike storage charges directly from the consignee under the former system. (R. JA 119.) And Mr. Connolly, in his letter of August 5, 1964, pointed out that in all the circumstances the charge was properly one for the account of the vessel rather than the consignee or shipper. (Ex. 2, JA 131.)

How the Commission Dealt with This Problem.

9. The Commission in its report discussed at length the effect of the free-time clause on the duties of the carrier and the terminal. It pointed out that the obligation of the vessel is to make sure that the consignee has a reasonable opportunity to pick up his cargo and that the purpose of free time is to make the opportunity a matter of tariff obligation. (Report, JA 76-85.)

10. The Commission observed: "Once free time has expired, the vessel's transportation obligation has ended." (Report, JA 81.) For this reason, the Commission concluded "that as to cargo which is in demurrage when the strike begins, it is an unjust and unreasonable practice within the meaning of section 17 to assess strike storage against the vessel." (Report, JA 81-82.)

11. As to cargo which was still on free time at the commencement of a strike, the Commission held that it was not unreasonable to charge the vessel, because it is still "the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services." (Report, JA 80.)

12. PBMTA and its members have not petitioned for any review with respect to the Commission's determination that they may not assess against the vessel strike storage on cargo as to which free time had elapsed at the commencement of the longshoremen's strike.

Jurisdictional Status of Case.

13. Upon initial promulgation of the tariff change, PBMTA told petitioner Boston Shipping Association that it would assess the charge in question to the vessel and if there was any complaint to file it with the Commission.

(Report, JA 71.) No complaint was then filed, however, and, after a 33-day strike, PBMTA brought a proceeding which is pending in the United States District Court for the District of Massachusetts. (Report, JA 72.)

14. The District Court (Wyzanski, C.J.) entered an Order on March 11, 1966, to the effect that the Commission had initial and primary jurisdiction to determine the lawfulness and reasonableness of the practice in question and staying the court proceeding to allow the carriers "a further opportunity to apply for and obtain" the Commission's determination. The Order further retained jurisdiction of the proceeding and any question of the application of the Administrative Procedure Act. (Complaint, Annex D, JA 20; Report, JA 72.) It may be noted that, even after filing their complaint, the carriers made a "contention that the Commission does not have jurisdiction in this matter" (Initial Decision, JA 41), a contention which now has been abandoned. (Compare Report, JA 72, note 7.) The Commission's Report was dated June 28, 1967. (Petition, JA 87.) Thereafter, the District Court amended its earlier Order to provide specifically that the carriers had the right to pursue their appeal. (Petition, JA 89.)

15. The petition for review was filed in this Court on or about September 19, 1967. This was more than 80 days after the Commission had made its decision. "Jurisdiction is invoked by filing a petition as provided by section 2344 of this title." 28 U.S.C. § 2342, 80 Stat. 622. "Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344, 80 Stat. 622.

16. The issue presented by the parties in the present proceeding, however, does not include any question as to timeliness. (Prehearing Stipulation, JA 95.) We suppose that the Court's Prehearing Order dated December 4, 1967,

approving the stipulation confirms the assumption of counsel that the case is before the Court on the merits. (Order, JA 98, second paragraph.)*

Statutes Involved.

Section 16 of the Shipping Act, 1916 (39 Stat. 734, 46 U.S.C. § 815), provides, insofar as relevant to the present case:

> "That it shall be unlawful for any shipper consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.
>
> "That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
>
> "First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

*The substance of the above text was written prior to receipt of the typewritten brief for the respondents, of which section I argues that the petition to review should be dismissed for lack of jurisdiction under 28 U.S.C. § 2344. Intervenors take no position on that question, having intervened only on the question of the merits.

Section 17 of the Act (39 Stat. 734, 46 U.S.C. § 816), provides:

> "That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.
>
> "Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Section 10(o) of the Rules of Practice and Procedure of the Federal Maritime Commission (46 C.F.R. § 502.155) provides as follows:

> "At any hearing in a suspension proceeding under section 3 of the Intercoastal Shipping Act, 1933 Rule 5(g), the burden of proof to show that the suspended rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the respondent carrier or carriers. In all other cases, the burden shall be on the proponent of the rule or order."

Summary of Argument.

The applicable standard of review contemplates that the Commission's decision will be set aside only if there is arbitrariness, error of law, or lack of substantial evidence supporting the findings. (Page 10.) Questions of "unreasonableness" and "preferential treatment" (such as the issues presented by petitioners) are mixed questions of fact and law, and on well-settled principles they are ordinarily left to the practical judgment of the agency. (Page 11.) Alternatively viewed, the action of the Commission should be sustained where it has a rational basis, and questions relating to free time are ones in which the agency's expertise should particularly be recognized. (Pages 12-13.) Clearly the vessel is a user of the pier with respect to cargo on free time. (Pages 13-14.) The Commission and its predecessor agencies have therefore a strong basis in logic for allocating some charges to the vessel in a situation when the consignee cannot get his cargo and the vessel cannot tender delivery. They have dealt before this with the problem of allocating terminal charges and may be presumed to have a degree of technical experience in the situation at hand. (Pages 14-16.)

Petitioners accuse the Commission of misapplying this Court's decision in the *American President Lines* case, but in actuality it is petitioners who miss the significance of that decision as applied to the present issues. (Pages 16-17.) Review and analysis of the background of *American President Lines,* having to do with terminal practices in the Port of New York, entirely confirm the Commission's interpretation. (Pages 17-19.) Two arguments of petitioners are readily disposed of. The first, that the free-time allowance in Boston is excessive in strike situations, is unsupported by any evidence. (Pages 20-21.) The second, that certain cargo-damage cases help petitioners

in their discussion of tender of delivery, is not supported by the actual holdings in question. (Pages 22-23.)

Argument.

I. The Commission's Order must be Sustained where there is Substantial Evidence in the Record to Support its Findings.

The basic standard of review is that the Commission's decision must stand unless it is found to be arbitrary, not in accordance with law, or unsupported by substantial evidence. 5 U.S.C. § 706, 80 Stat. 393. This Court has recently and often applied the standard as to findings of the Commission. *U.S. Atlantic & Gulf/Australia-New Zealand Conference* v. *Federal Maritime Commission,* 124 U.S. App. D.C. 303, 305, 364 F. 2d 696, 698 (1967). *Aktiebolaget Svenska Amerika Linien* v. *Federal Maritime Commission,* 125 U.S. App. D.C. 359, 372 F. 2d 932 (1967). *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission,* 125 U.S. App. D.C. 282, 289-290, 371 F. 2d 747, 754-755 (1966), appeal argued and pending in United States Supreme Court. "Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131, 141 (1966). As this Court noted in the *Volkswagen* case, the Commission's construction of a statutory term need not be the only reasonable one or even the result that the Court would have reached had the question arisen in the first instance in judicial proceedings. "Deference must also be paid in this case to the Commission's expertise,

especially in view of the technical and specialized nature of the subject area over which it has jurisdiction.'' (371 F. 2d at 755.)

The Commission in the present case made two conclusions which are the subject of attack by petitioners. The first (in order of discussion) was that the assessment of strike storage on cargo still on free time at the commencement of the strike ''is a just and reasonable one under section 17.'' (Report, JA 81.) And further: ''We therefore conclude that the strike storage rule was applicable to the situation in issue and of itself did not constitute an unreasonable practice under section 17.'' (*Ibid.*, JA 83.) The second was that the assessment of strike storage in the situation at hand under no circumstances resulted in violation of section 16. (*Ibid.*, JA 85.)

The issue under each of the two relevant statutory provisions is the type of ''mixed'' question of fact and law discussed at length by such authorities as 4 Davis, Administrative Law Treatise, § 30.03 (1958). It is perfectly clear, by the authorities cited by Professor Davis, that issues of ''unreasonableness'' and ''preference'' have been generally considered by the Supreme Court to be within the practical judgment of the regulatory commission involved.

Thus, compare with the problem of ''unreasonable practices'' under section 17, the case of *Adams* v. *Mills*, 286 U.S. 397, 409-410, 52 S. Ct. 589, 76 L. Ed. 1184, 1192-1193 (1932), involving application of the Transportation Act, 1920. In determining whether an extra charge for unloading livestock was an unlawful practice, Brandeis, J., there pointed out: ''If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained.'' And, with the problem of ''undue or unreasonable preference or advantage'' under section 16 of the Shipping Act,

compare *Pennsylvania Co.* v. *United States,* 236 U.S. 351, 361, 35 S. Ct. 370, 373, 59 L. Ed. 616, 623 (1915), the Court pointed out that, with reference to section 3 of the Interstate Commerce Act, "This section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; what is such undue or unreasonable preference or advantage is a question not of law, but of fact."

Another method of dealing with the problem of scope of review is to avoid the law-fact distinction and to hold that the administrative decision is final if it has warrant in the record and a rational basis in law. The "rational basis" test cannot be the result of a strict formula, but depends among other things upon the "comparative qualification of the agency and of the court to decide the particular issue." Davis, op. cit. § 30.09. Although the *Consolo* opinion quoted from above deals largely in terms of facts, it will be noted that the quoted material (pp. 10-11) is also in terms of the expertise of the agency.

Thus, in *International Packers, Ltd.* v. *Federal Maritime Commission,* 123 U.S. App. D.C. 55, 356 F. 2d 808 (1966), the Court held that the Commission was justified in ruling that extra compensation for strike-caused expenses was sufficiently specified by being included in a bill of lading without specification of the rate, where the bill of lading was filed along with the tariff. The Court's language is as follows: "This is clearly a question the resolution of which must be left primarily to the agency with expert experience in the everyday relations of the shipping industry, and to which Congress has entrusted primary responsibility for the effectuating of the purposes of the Act. The statute calls for the filing of rates and charges and any rules or regulations affecting those charges. The Commission is far better suited than courts to determine what degree of spec-

ificity is required in a particular situation, in light of the practicalities of the shipping industry." 123 U.S. App. D.C. at 58, 356 F. 2d at 811.*

The same view is expressed in *Baltimore & Ohio R. Co.* v. *United States,* 208 F. 2d 734, 735 (3d Cir. 1953), in which the Federal Maritime Board was sustained in requiring railroad-owned piers in Philadelphia to allow five days of free time to truck cargo. "An administrative body with jurisdiction has made an order. We think this is a case in which the order is of a kind peculiarly within the responsibility of that body. Its responsibility is comparable to that of the National Labor Relations Board in deciding upon the proper remedy for unlawful practices. In neither event should a court interfere unless the administrative body has acted without authority of law or unless its order is so inappropriate as to be an abuse of discretion." 208 F. 2d at 737.

II. Allocation of the Charge for Pier Storage is Peculiarly within the Commission's Regulatory Jurisdiction.

It cannot reasonably be supposed that the vessel's Boston responsibility is ended at the end of ship's tackle or

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*Another statement of the same general position is that of Judge Learned Hand in *National Broadcasting Co.* v. *United States,* 47 F. Supp. 940, 946 (S.D. N.Y. 1942), affirmed, 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344 (1943), in part quoted with approval in *Philadelphia Co.* v. *Securities & Exchange Commission,* 85 U.S. App. D.C. 327, 177 F. 2d 720, 724 (1949): "Each side has stated its reasons and the Commission has chosen. It was created to make such choices because Congress believed that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case. That doctrine applies here with especial force just because the findings are necessarily prospective; time alone can decide their success or their failure."

at the point of rest. While it is certainly true that the consignee or shipper has an interest in the goods, the findings persuasively indicate an interest in the carrier as well, indeed one which in some degree extends beyond free time. "Because of this [*i.e.*, the fact that some cargo on the pier is on free time and some on wharf demurrage], complainants do not consider that their responsibility toward the cargo ends at the expiration of free time. Rather, they believe that they should use average care to see that cargo is delivered in the same condition in which it was received. Complainants employ watchmen to guard against such things as pilferage, and complainants consider delivery takes place when they receive a signed receipt of some kind from the party that next takes over the cargo. The record reveals that complainants consider that when this occurs, their obligation ceases." (Report, JA 70.) Even without these circumstances, the vessel has the primary duty to make sure five days' free time are afforded, during which it tenders the cargo for delivery.

The Commission in the administration of its functions under the Shipping Act, 1916, could with entire propriety allocate the charges to a party who derives some use from the service involved. There are, it should be noted, at least two other agency decisions which tend in a like direction in somewhat different areas.

In *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53 (1956), amended 5 F.M.B. 326 (1957), the question was assessment of handling and service charges under the so-called Freas formula. The initial report of the Federal Maritime Board required that such charges be assessed against the party for whom, under the contract of affreightment, they have been incurred. The Board amended the report at the suggestion of the Northwest Marine Terminal Association and its members, who argued that, since they were not parties to the contract of affreight-

ment, they could not tell where liability should be placed. The amendment provided that "in every case the terminal operator may bill and collect from the vessel, and in instances where the charges incurred for the benefit of the cargo the carrier shall bill and collect such charges from the shipper or consignee." 5 F.M.B. at 327.

Even more significant is a decision of the Federal Maritime Commission made subsequent to the decision now in issue. *Boston Shipping Association* v. *Port of Boston Marine Terminal Association,* Docket No. 66-35 (mimeo. July 27, 1967). In that case an issue was whether it was an unreasonable practice under section 17 of the Shipping Act, 1916, to charge wharfage against the vessel, rather than against the cargo as previously had been done. "Wharfage" was defined as the charge for use of pier or wharf and was rated on a tonnage of cargo basis. The Commission pointed out that the vessel's obligation to "tender for delivery" included the duty to provide adequate terminal facilities upon which cargo might be placed. The Commission then observed: "Since the terminal provides a service which is in furtherance of the *carrier's* obligation, it follows that 'wharfage' is an appropriate charge against the vessel." (Mimeo. at pp. 10-11.)

In the light of the substantial experience of the Commission and its predecessor agencies (see citations at page 20, *infra*) with respect to the problem of free time, it is apparent that the allocation between parties of who should bear the expense of strike storage is one for administrative determination. Cases involving the somewhat related principle of primary jurisdiction in the general area of transportation are particularly germane in their reasoning. The line of cleavage in this area is described in the dictum of Mr. Justice Brandeis in *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U.S. 285, 291, 42 S. Ct. 477, 479, 66 L. Ed. 943 (1922), quoted at length in 3 Davis, Admin-

istrative Law Treatise, § 19.02 (1958): "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. . . . It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." The Court went on to rule that the construction of a railroad tariff was not subject to the doctrine.

While primary jurisdiction is a doctrine separate from that of scope of review (Davis, op. cit., § 19.01), the considerations mentioned above are strong, in the case at bar, in favor of deference to the administrative determination. The rate or practice here "is attacked as unreasonable or as unjustly discriminatory." The determination involved is "essentially one of fact and discretion in technical matters." The Commission has been working with the problem of free time in other ports under varying factual patterns, and "uniformity can be secured only if its determination is left to the Commission."

III. Petitioners' Reliance upon American President Lines is Misplaced.

Both in their petition (JA 92; compare JA 89) and at the outset of their brief, petitioners attempt to use this Court's opinion in *American President Lines, Ltd.,* v. *Federal Maritime Board,* 115 U.S. App. D.C. 187, 317 F. 2d 887 (1962), as a legal support for their challenge of the Commission's result in this case. Petitioners correctly observe

that *American President Lines* was affirmatively referred to by the Commission in the case at bar, but they entirely miss the point as to why the Commission did so.

At the core of the *American President Lines* decision is the following definition of the concept of "tender for delivery," the Court here speaking of the carrier: "It makes a valid and complete tender when it puts the cargo on the dock, reasonably accessible, properly segregated and marked, and leaves it there for five days; with notice, of course." 115 U.S. App. D.C. at 189. The rule (or "interpretation") that was before the Court at that time would have denied the carriers (operating the New York piers) the right to charge strike storage even though this obligation had been entirely performed at the outset of the longshoremen's strike. The Court determined that this denial would have resulted in "a denial of just compensation for a service rendered." 115 U.S. App. D.C. at 191.

Clearly the present case presents no such issue in favor of the petitioners. The issue here is whether the terminals, separate entities from the carriers, may charge strike storage to the vessel where the cargo is still on free time and tender for delivery has not been completed.

The history of the *American President Lines* case really begins with *Storage of Import Property,* 1 U.S.M.C. 676 (1937), in which the United States Maritime Commission ordered carrier respondents to cease and desist from allowing more than ten days' free time on import cargo at the Port of New York. The Commission noted (1 U.S.M.C. at 678) that, in contrast to other ports, including Boston, where the respondent carriers did not lease or control pier facilities, at the Port of New York the carriers operated the pier facilities, usually at considerable expense, by lease or other arrangement. The Commission further characterized "free time" in its 1937 report as follows: "As a proper part of their transportation service respondents

should allow only such free time as may reasonably be required for the removal of import property from their premises, based on transportation necessity and not on commercial convenience." 1 U.S.M.C. at 682.

The next installment of the history is the report of the Commission in *Free Time and Demurrage Charges at New York,* 3 U.S.M.C. 89 (1948), where, among other matters, the carrier respondents were ordered to provide at least five days' free time. The 1948 report reviewed the well-established rule on free time in the following terms: "It should be noted that free time is granted by the carriers not as a gratuity, but solely as an incident to their obligation to make delivery. *The Eddy,* 5 Wall. 481, 495; *The Titania,* 131 F. 229, 230. This is an obligation which the carrier is bound to discharge as a part of its transportation service, and consignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties." 3 U.S.M.C. at 101.

A specific problem in the 1948 report was whether strikes should affect the free-time allowance. The carrier respondents extended free time in the event of strikes by the carrier's employees. This practice was not seriously disputed. A tariff which extended free time on cargo not available for delivery was held to "afford adequate protection to consignees against the assessment of demurrage where, due to strikes of carrier personnel, or other impediments, cargo cannot be tendered for delivery." 3 U.S.M.C. at 107. Where prevention of removal of cargo was caused by a truckers' strike, and the carrier was not unable to tender for delivery, a different situation existed (3 U.S.M.C. at 106-107), and the Commission held that the carriers should be able to charge demurrage but only at a reduced rate (so-called first-period demurrage charges) for the duration of the strike.

From the foregoing it is apparent that the Commission in the present case did not confuse "delivery" with "tender of delivery" or "tender of delivery" with free time. On the contrary, it held that provision of free time is a transportation obligation, here lasting five days, and that tender of delivery is made during that period. Once free time has expired, cargo left on the piers during the subsequent longshoremen's and clerks' strike is at the expense of the consignee.

It should be remembered that in New York the carriers operate the piers. This is a considerable expense, and it is borne by the carriers without charge in New York when cargo is locked on the piers by a strike of employees of the vessel commencing during free time. There is no reason why in Boston the carriers should be immune from this concededly unfortunate expense. While the occurrence of strikes is not due to the moral fault of the carriers, it is certainly not the responsibility either of the terminal operator or of the consignee who has not been accorded a reasonable opportunity to get his cargo.*

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*The latest chapter in the history of free time and demurrage charges in the Port of New York is a change in General Order 8, Part I, issued in Docket No. 65-14, amending 46 C.F.R. §§ 526.1(c) and 526.1(d) and adding a new 46 C.F.R. § 526.1(f). See 32 Fed. Reg. 17667 (December 11, 1967). The new regulation includes in part the following: Where the carrier is unable to tender delivery, free time must be extended by it for the period of disability. If the condition arises after the expiration of free time, however, first-period demurrage can be made applicable. Where a consignee is prevented from removing his cargo by factors beyond his control, such as but not limited to longshoremen's strikes affecting the entire Port area, carriers must assess demurrage at the first-period rate as long as the inability to remove the cargo continues. The Commission at about the same time issued a Report elaborately dealing with the factual circumstances in the Port of New York. *Free Time and Demurrage Practices on Inbound Cargo at New York Harbor*, F.M.C. Docket No. 65-14 (mimeo., December 7, 1967).

IV. Five Days' Free Time on Import Cargo, and Seven Days on Export, have Not been Shown to be Unreasonably Long Periods in the Circumstances of a Longshoremen's Strike.

Petitioners deal with the well-established concept of free time as affording a "reasonable opportunity" to the consignee to pick up cargo, but they appear to argue that a shorter period than five days, or seven in the case of export cargo, is required in the case of strikes.

In the first place, no such argument was presented to the Commission. "Free time of five days was allowed on import cargo, and seven days allowed on export cargo. There is no issue presented as to the reasonableness of these periods." (Report, JA 68.)

In the second place, the Commission's predecessor agencies have already been over the amount of free time in various circumstances. *E.g.*, see *California* v. *United States,* 320 U.S. 577, 64 S. Ct. 352, 88 L. Ed. 322 (1944); *Free Time and Demurrage Practices at New York,* 3 U.S.M.C. 89 (1948); *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966). In the New York case the United States Maritime Commission observed, on the question whether five or six days was reasonably adequate, that the best index to the adequacy of free time was evidence relative to the frequency and amount of demurrage assessments. 3 U.S.M.C. at 101. If penalty demurrage is assessed with great frequency, then presumably the free time is inadequate. But PBMTA is unaware of any case in which a free time of less than five days was prescribed. *Per contra,* it may be observed that in *Baltimore & Ohio R. Co.* v. *United States,* 208 F. 2d 734 (3d Cir. 1953), an order of the Federal Maritime Board requiring railroad terminals to increase the duration of free time from two days to five days was sustained. It must be remembered that there are

various steps which may be required before goods can be removed from piers, and truck transportation must be arranged for. 3 U.S.M.C. at 95-98.

Despite the present contention of petitioners, there is no indication either in the record of evidence before the Commission, in the complaint filed before the Commission or in the petition filed in this Court that the free-time provision was, in the phrase of petitioners in their principal brief, "inordinate and even protracted." There is no reason to assume that the occurrence of a longshoremen's strike reduces the amount of time ordinarily necessary for picking up cargo. On the contrary, the imminence of a strike might be expected to make the situation worse for the consignee and trucker before and after the strike, due to the piling up of cargo and more intense use of the piers.

To bolster their belated contention about free time, petitioners state in a footnote in their brief that "special attempts" were made urging consignees to pick up cargo. There were, however, no data before the Commission showing how much cargo was in fact left on the piers, or whether calls had been made generally on the several piers, or at what time any such calls were made.* Thus, even assuming validity in the premise that consistent and timely "special attempts" might justify establishment of a different period of free time, there was nothing that required the Commission to go further into the matter.

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*Compare *Free Time and Demurrage Practices on Inbound Cargo at New York Harbor*, F.M.C. Docket No. 65-14 (mimeo., December 7, 1967): "The agreement of the negotiators was rejected by the rank and file members of the longshoremen's union on Friday, January 8, 1965, and the strike commenced on the following Monday. As there had been no advance warning that the strike was a certainty, no general alert was given to the terminals, truckers and importers that they should make extra efforts to remove cargo from the piers. On the occasions of strikes in the past there has been sufficient advance warning to allow the importers to pick up their cargoes before the strikes began."

V. Petitioners Misconstrue the Cargo Damage Cases on which They Rely.

Before closing their brief, petitioners refer to *Standard Brands, Inc.*, v. *Nippon Yusen Kaisha,* 42 F. Supp. 43 (D. Mass. 1941). The interesting thing about this citation is that it is squarely against the proposition which petitioners seek to establish, perhaps more so than the Commission's report itself. Judge Sweeney there held that the responsibility of the vessel for cargo damages as a carrier (and hence as an insurer) might have ended earlier but that its responsibility as a bailee continued until actual receipt of the goods by the consignee. The Court observed that some cases had put it that the vessel's "liability charges from that of a common carrier to that of a warehouseman, and, as such, it is bound to exercise ordinary care in the protection of the goods." 42 F. Supp. at 43-44. From *Standard Brands,* as well as from facts recounted in the Commission's findings here as to custody in the carriers and the carriers' views of their own duties (see page 14 above, and Report, JA 70), petitioners indeed believed that they could justifiably charge strike storage or cargo as to which free time had expired at the beginning of a strike.*

The citations by petitioners in the next-to-last paragraph of their brief of *Calcot, Ltd.*, v. *Isbrandtsen Co.*, 318 F. 2d

*To the same effect as *Standard Brands* is the case of *David Crystal, Inc.*, v. *Cunard Steamship Co., Ltd.*, 339 F. 2d 295 (2d Cir. 1964), cert. den. 380 U.S. 976, relied on by petitioners in the last paragraph of their brief. That case held that the carrier (Cunard) remained liable as a bailee of a cargo of shirts misdelivered, apparently from the point of rest on the pier, even though the applicable bill of lading provided that Cunard's responsibility would cease when delivery was made from *the ship's deck* and that, if the goods were not immediately received by the consignee, Cunard could abandon them on the wharf.

669 (1st Cir. 1963), and *North American Smelting Co.* v. *Moller S.S. Co.*, 204 F. 2d 384 (3d Cir. 1953), likewise fail to establish petitioners' arguments. In *Calcot* the goods were in the "sole and exclusive" possession of the consignee at the time of the fire loss there in issue (see 318 F. 2d at 672), and the Court held that there was no basis to hold the carrier on a theory of negligence. The reference in the opinion to free time had only to do with an apparent contention by the plaintiffs that failure of the consignee to take delivery within the free-time period destroyed an argument of the carrier that delivery had been effectively made under its bill of lading; in fact, delivery had been made and the bill of lading surrendered by the consignee. (318 F. 2d at 673.) In *North American Smelting*, a bulky cargo of metal was being taken away by a consignee on a Friday (five days after the arrival notice) from a pier and a remainder of the consignee's goods was left unguarded over the weekend. The following Monday some of the goods were missing. The Court of Appeals noted that the issue "was somewhat confused . . . by reference, to the so-called five-days free time rule which prevails on this pier," and ruled that the carrier was not shown to have acted negligently in not providing guard service, pointing out that, due to their weight, the goods could be removed only with a half-lift truck. The suit was for failure to make delivery, not failure to make tender of delivery.

Conclusion.

The results in the case at bar are equitable between the parties, are consistent with the public interest, and in a somewhat technical area appear to conform to common sense. PBMTA and its members are not trying to make a profit from making the ½¢ charge to the vessel rather

than the cargo interests, and they are within reason in considering the vessel in some degree the user of the space in question where free time has not expired. Each side has stated its reasons, and the Commission has made the status of cargo as to free time the determining factor in determining whether the consignee rather than the vessel should pay strike storage. For the reasons stated, the action of the Commission should be affirmed.

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REPLY BRIEF FOR PETITIONERS

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

No. 21,305

THE BOSTON SHIPPING ASSOCIATION, INC., ET AL.,
Petitioners,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

On Petition to Review and Set Aside an Order of the Federal Maritime Commission

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

In reply to the briefs of the Intervenors and Respondents, we reaffirm that the issue before the Court of Appeals is one of law. In their administrative judgment the Maritime Commission determined that the reasonable allocation of the disputed strike storage charges would be the pattern of legal responsibility. Having made that determination as their administrative decision, however, the Maritime

Commission erroneously applied the law. It is that error of law, therefore, which warrants Appellate review.

The issue, therefore, is not the reasonableness of the decision of the Commission on grounds of policy. The issue is the correctness of the Commission's decision as a matter of law since the Commission chose to follow the legal principles as the best way of determining what would be reasonable as a matter of policy.

Sections 1, 2 and 4 of the Intervenors' brief in our view are improperly addressed to this Court since they do not address themselves to the issues of law presented upon this appeal. These sections of the Intervenors' brief at best submit themselves as arguments of fact which have already been considered by the Maritime Commission. The Maritime Commission saw fit instead to rest the decision of the Commission upon rules of responsibility defined by the common law. Accordingly, the issues of consideration upon this appeal lie only in Sections 3 and 5 of the Intervenors' brief.

The Intervenors, in their brief, continue to misconstrue Petitioners' citation of *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F2d 887 (1961), upon which the Petitioners rely. In the very opening of its opinion the Court recited the fundamental principles of common law which are the standards the Maritime Commission erroneously attempted to adopt in reply. They are found in the following sensitive quotation on page 888 of the opinion:

> "Ships bringing transoceanic freight into port are required by their transportation obligation, absent a special contract, to unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable

opportunity to come and get it. This was settled by the courts many years ago.[1] Circuit Judge Goodrich stated, in *North American Smelting Co.* v. *Moller S.S. Co.*,[2] that 'There is no doubt that in discharging the cargo onto the pier and notifying the consignee the carrier was no longer in possession of the goods so as to suffer the risk of loss not due to any negligence on its part.' The work of unloading and putting the cargo on the dock is done on behalf of the carrier by longshoremen, who are laborers skilled in this sort of thing, or by stevedoring companies under contract with the carriers, these stevedores employing longshoremen. There is not now, and does not appear ever to have been, absent a special contract, any obligation on the part of the carriers to put such cargo actually into the hands of consignees, as by putting it into trucks and hauling it to the consignees' places of business. Consignees are obligated, after notice and reasonable opportunity, to come and pick up their goods at the pier."

Only if the strike had affected a single terminal and the carrier had negligently elected to expose the cargo to that strike-bound terminal, in contrast to leaving it at any other available terminal unaffected by the strike, could the carrier be held liable for the cost of strike storage as a matter of law. Similarly, only if he selected a terminal

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[1] See, e.g., *The Eddy*, 5 Wall. 481, 495, 72 U.S. 481, 495, 18 L.Ed. 486 (1866); *Ex parte Easton*, 95 U.S. 68, 75, 24 L.Ed. 373 (1877); *The Grafton*, 10 F. Cas. 907 (No. 5656) (S.D.N.Y. 1844), aff'd, 10 F. Cas. 905 (No. 5655) (C.C.S.D.N.Y. 1846); *The Titania*, 131 F. 229 (2d Cir. 1904); *Southern Pac. Co.* v. *Van Hoosear*, 72 F.2d 903, 907 (9th Cir. 1934); *Baltimore & O. R. Co.* v. *United States*, 201 F.2d 795, 797 n. 3 (3d Cir. 1953); *Miami Struct. Iron Corp.* v. *Cie Nationale, Etc.*, 224 F.2d 566, 568 (5th Cir. 1955).

[2] 204 F.2d 384, 386 (3d Cir. 1953).

with defective doors, so that the cargo was exposed to wetting, in contrast to leaving it at a terminal where it would be adequately sheltered, could he be held liable for damage;* for the damage in the former case would be the natural and proximate consequence of his negligent decision to leave it at that terminal. In short, the obligation of the carrier to the consignee requires a reasonable performance. It does not place upon the carrier the burden of insuring the goods either against damage after they have been left at a reasonable pier or against strike demurrage after they have been left at a reasonable pier. Since the Maritime Commission purported to rest its administrative decision on areas of legal responsibility, it must follow those areas of legal responsibility in a manner consonant with the actual rules of law which the courts have established.

The Intervenors admit that the "carrier" in the case which concerned the Port of New York was also the operator of the terminal. In that decision, therefore, the term "carrier" had a double connotation: that of a carrier as navigator of a ship; and that of a terminal operator at the Port of New York. The Boston connotation is limited to the carrier qua carrier, i.e. native to the operation of his ship. To illustrate this distinction, the Carriage of Goods by Sea Act applies to carriers while they are operating their vessels. Section 1304, Title 46, U. S. Code Annotated, of the Carriage of Goods by Sea Act, expressly permits a carrier to exempt itself from any responsibility for strikes:

> "Uncontrollable causes of loss
>
> (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or result-

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**Standard Brands, Inc.* v. *Nippon Yusen Kaisha*, 42 F. Supp. 43 (D. Mass. 1941).

> ing from . . . (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts."

The legal effect of the Maritime Commission's decision in the present case would do violence to that statutory policy since it would charge the carrier at Boston, when the carrier is only a carrier, with costs of strikes in favor of the consignee.

The Petitioners contend that a proper tender for delivery is made when the vessel discharges the goods and deposits them at a place of rest on the pier and gives notice to the consignee. A tender for delivery is made at that point in time and action. The goods need not be moved from the place of rest for five days but that does not mean that a tender has not been made prior to the expiration of the five-day free time period, namely after reaching the reasonable place of rest with notice. In *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 FMC 505 (1966), the Commission supported this contention by the following statement at page 525:

> "The opinion of the Circuit Court of Appeals for the District of Columbia in *American President Lines, Ltd. v. Federal Maritime Board* . . . indicates that the common law duty of a common carrier does not extend beyond placing the goods at a place of rest on the pier accessible to the consignee."

Neither Respondents nor Intervenors cite any case in opposition to the *American President Lines case*. Intervenors cite a post-dated amendment to General Order 8,

Part I, 46 CFR 526, 1(c), (d) and (f) effective February 15, 1968. This, however, is a policy ruling and the Commission in the instant case chose to decide the question as a matter of law. The Respondents contend that the Commission is best able to decide the extent of the carrier's transportation service. The immediate question concerns tender for delivery terminating the carrier's duty as a carrier, and this question has been clearly decided at common law. The Commission erred in its attempted application of that common law.

The Commission's decision that a tender for delivery is not made until the end of the free time period confuses "delivery" with "tender for delivery". At the termination of the free time period, the consignee has the duty to pick up the cargo or be penalized by demurrage. A constructive delivery has been made. The duty of the carrier is not to make delivery or constructive delivery but merely to tender for delivery. The Commission seeks to impose the requirement of delivery or constructive delivery on the carrier and in so doing misconstrues the law. Assuming *arguendo* that a tender for delivery is not made until the expiration of the five-day free time period, the Commission erred in tolling the free time period, and the tender for delivery for the duration of the longshoremen's strike. Its decision is in legal conflict with both its own regulation, 46 CFR 526, 1(c) and (d), and the *American President Lines case*.

In the *American President Lines case*, amendment No. 2 to General Order 69 could only be justified if the carrier's transportation obligation had not ceased. The Court found that amendment No. 2 required actual delivery rather than tender for delivery and thus violated common law. The Court found that the General Order itself which tolled free time if the carrier, through its fault, could not deliver or refused to deliver, but did not toll free time when the

consignee was unable to pick up the cargo because of trucking strikes or weather conditions, not only adhered to the practice of the trade but also recognized the obligation of the carrier to merely tender for delivery. The carrier was only required to leave the goods in a designated place of pick-up for five days and an intervening strike would not be deemed to interfere or prevent the carrier's tender for delivery.

The carrier's duty as a carrier ceases when the goods are tendered for delivery. Respondents seek to extend the carrier's obligation to the expiration of free time and Intervenors even beyond that period. The case of *David Crystal, Inc.* v. *Cunard Steamship Co.*, 339 F.2d 295 (1964) and the case of *Standard Brands* v. *Nippon Yusen Kaisha*, 42 F. Supp. 43 (D. Mass. 1949) support the Petitioners' contention that once the cargo is deposited at its place of rest on the pier and notice is given, the transportation obligation is ended—thereafter, the status of the carrier is merely that of a bailee. It is because of this status as bailee that Petitioners maintain clerks and guards and obtain receipts, not because their obligation as a carrier had not ceased.

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